No. 12,406

In the United States Court of Appeals for the Ninth Circuit

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

SUMNER RHUBARB GROWERS' ASSOCIATION, A COOPERATIVE AGRICULTURAL CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLANT

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Clark Squire, Collector of Internal Revenue, Appellant

v.

Sumner Rhubarb Growers' Association, a Cooperative Agricultural Corporation, appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLANT

OPINION BELOW

The Findings of Fact and Conclusions of Law (R. 34-38) and oral opinion of the court below (R. 27-33) have not been officially reported.

JURISDICTION

This is a suit by Sumner Rhubarb Growers' Association, a cooperative agricultural corporation organized under the laws of the State of Washington (herein referred to as the taxpayer), against the Collector of Internal Revenue for the collection district of Washington, to recover amounts aggregating $89.14 paid by the taxpayer as employment taxes under the Federal

Insurance Contributions Act [1] for periods beginning October 1, 1942, and ending June 30, 1946. (R. 2-6.) The complaint was filed in the District Court of the United States for the Western District of Washington on August 13, 1948, within the time provided by Section 3772 of the Internal Revenue Code. (R. 21.) The suit is based upon five separate claims for refund aggregating $366.03 for the respective periods involved (R. 7-21, 25) which were duly and timely filed with the Collector of Internal Revenue on November 18, 1946 (R. 5, 25, 37), more than six months prior to the commencement of this action. By a letter dated June 24, 1948 (R. 5, 25, 37), the Commissioner of Internal Revenue notified the taxpayer of his rejection of its claim for refund of $25.08 for the period from January 1, 1946, to June 30, 1946 (being the latest tax period involved), and by another letter of the same date (R. 44-48) the Commissioner advised the taxpayer that its remaining claims for refund would be adjusted in accordance with his ruling therein as to its liability for the employment taxes therein involved.[2] Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. The cause was tried to the court below on May 16, 1949 (R. 26), at which time the court announced, in an oral opinion (R. 27-33, 97-104), its decision in favor of the taxpayer. The findings of fact, conclusions of law, and judgment of the court below were entered June 29, 1949. (R. 34-40.) The notice of appeal was filed August 25, 1949. (R. 41.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

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[1] Internal Revenue Code, Secs. 1400-1432, as amended.

[2] While the record indicates that no refunds had been made to the taxpayer at the time the suit was brought (R. 5-6, 25, 37), the parties apparently have proceeded on the assumption that the ruling in question contemplated refund of all of the taxes claimed except the $89.14 sued for in this action.

QUESTIONS PRESENTED

Whether the taxpayer was exempt under Section 1426 (b) of the Internal Revenue Code, as amended, from the employment tax here involved, imposed under Section 1410 of the Code, as amended:

1. Because it was exempt under Section 101 (1) of the Code from federal income tax;

2. Because it was exempt under Section 101 (12) of the Code from federal income tax; or

3. Because the services of its employees with respect to which the tax involved was imposed constituted "agricultural labor" within the meaning of Section 1426 (h) of the Code, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code and Treasury Regulations 111 promulgated thereunder are printed in the Appendix, *infra.*

STATEMENT

The taxpayer is a cooperative agricultural corporation organized under the laws of the State of Washington. The purposes for which the corporation was organized are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb, and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business. The primary purpose for the organization of the taxpayer was to handle the agricultural and horticultural products of its members upon

a cooperative basis, and to handle all of such products of members who signed the standard marketing agreement of the taxpayer upon the basis of actual cost to the taxpayer, and an amount apportioned over the entire operations of any one season. (R. 34-35.)

During the periods here involved the taxpayer was engaged in Sumner, Washington, in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley. All of the rhubarb handled by the taxpayer was grown on the farms of members of the association, and practically all of the rhubarb sold was shipped from packing on the farm where it was grown. The rest of the rhubarb which the taxpayer handled during the periods in question was packed at the taxpayer's warehouse in Sumner, Washington. All of the rhubarb, after being packed, was shipped from the taxpayer's rented warehouse. (R. 35.)

The operations of the taxpayer during the periods covered by the claims for refund involved in this proceeding were seasonal, extending from January to the middle of May of each year. (R. 36.)

In the year 1931 the Commissioner of Internal Revenue ruled that the taxpayer was exempt under Section 103(12) of the Revenue Act of 1928, c. 852, 45 Stat. 791, from payment of the income tax imposed under that Act. (R. 36.) In its complaint the taxpayer alleged (R. 4), and the court below found (R. 36), that the taxpayer had maintained that exempt status during the period from October 1, 1942, to June 30, 1946, the period for which the employment taxes here involved were paid. The exemption provision in question is now incorporated in Section 101(12) of the Internal Revenue Code, and, while the taxpayer's right to recover the employment taxes here involved does not necessarily depend upon whether the taxpayer is exempt under this provision from the payment of income taxes, it is to be-

noted that under date of March 12, 1948, the Commissioner of Internal Revenue revoked his earlier ruling of exemption effective January 1, 1939, the effective date of the Internal Revenue Code, for failure of the taxpayer to furnish proof of its exempt status under the Code. (R. 45-46.)

For stated periods between October 1, 1942, and June 30, 1946, the taxpayer paid employment taxes aggregating $366.03 under Section 1410 of the Internal Revenue Code, as amended, with respect to having persons in its employ, in the amounts and on the dates set out in the findings of the court below. (R. 36-37.) Thereafter the taxpayer duly and timely filed a claim for refund of such employment taxes for each of the five periods involved. (R. 7-21, 37.) Each of these claims for refund was based upon the grounds (1) that the taxpayer was exempt under Section 101(1) of the Internal Revenue Code from the payment of income tax and therefore exempt from the payment of any employment tax, and (2) that the employment with respect to which the taxes were paid was "agricultural labor" within the meaning of applicable provisions of the law and therefore exempt from the employment tax. (R. 7-21.)

By a letter dated June 24, 1948 (R. 25), the Commissioner disallowed the claim for refund (R. 19-21) of the taxes paid for the period January 1, 1946, to June 30, 1946, and advised the taxpayer that its remaining claims would be adjusted in accordance with a ruling contained in another letter (R. 44-48) to the taxpayer of the same date. This latter letter ruled that the taxpayer was not an agricultural or horticultural organization within the meaning of Section 101(1) of the Internal Revenue Code, and not thereby exempt under Section 1426-(b)(10)(B) of the Code, as amended, from the payment of employment taxes. The Commissioner further held

that since the taxpayer had failed to submit evidence that it was entitled to exemption from income under Section 101(12) of the Code, the adjustment of the claims filed by it could be based only on the extent to which the services performed for the taxpayer by the individuals involved were excepted as "agricultural labor" in accordance with Section 1426(h)(4) of the Code, as amended, and proceeded to classify such services as were excepted as "agricultural labor" under his ruling and those which constituted employment with respect to which the taxpayer was held to be subject to the employment tax. (R. 44-48.)

On the basis of this ruling as to what services performed for the taxpayer constituted "agricultural labor" and what services constituted "employment" for purposes of the employment tax the taxpayer brought this suit for refund of only $89.14 as the amount which still would be due it on the basis of this ruling. (R. 5-6.)

Without definitely passing upon the question whether the services performed for the taxpayer which the Commissioner classified "employment" with respect to which the employment tax had been properly paid, or constituted "agricultural labor" excepted from the tax, the court below concluded as a matter of law (R. 38) that the taxpayer was exempt under Section 101(1) [3] and (12) of the Code and entered judgment for the taxpayer (R. 39). This appeal is taken from that judgment. (R. 41.)

STATEMENT OF POINTS TO BE URGED

The Collector of Internal Revenue relies upon the following errors as a basis for this appeal (R. 52-53):

1. The court below erred in concluding that the taxpayer's employees were exempt from the federal social

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[3] The reference to Section 10(1) in the court's conclusions of law (R. 38) clearly was an error.

security tax under Section 101(1) and (12) of the Internal Revenue Code, or either of these sections.

2. The court below erred in finding that the taxpayer maintained a tax exempt status during the tax period from October 1, 1942, to June 30, 1946, involved in this action, or any portion of that period, and that it was entitled to a tax refund.

3. The court below erred in holding that the services performed for the taxpayer did not constitute employment under Section 1426(b)(10)(A) and (B) of the Internal Revenue Code.

4. The court below erred in failing to hold that the services performed for the taxpayer constituted employment under Section 1426(b) of the Internal Revenue Code, and were not exempt under subsections (b)(1) and (h) of that section.

5. The court below erred in entering judgment for the taxpayer.

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act, among other things, imposes an excise tax, in addition to other taxes, upon every employer with respect to having individuals in his employ, equal to a stated percentage of the wages paid for such services. Exemptions from the tax is accomplished in certain cases by excluding from the statutory definition of "employment" with respect to which the tax is levied certain enumerated classes of services performed by an employee for his employer. Among the excluded services specifically enumerated are "agricultural labor" as defined in the Code, service performed in the employ of an "agricultural" or "horticultural" organization exempt under Section 101(1) of the Code from payment of the income tax, and service performed in the employ of a corporation

exempt under Section 101 of the Code if (1) the remuneration for service performed in any one quarter does not exceed $45, (2) the service is in connection with the collection of dues for a fraternal beneficiary society, order, etc., away from the home office, or (3) is performed by a student of a school, college, or university. Section 1426(b)(1) and (10)(A) and (B) of the Code, as amended.

The taxpayer is not an exempt corporation within the meaning of Section 101(1) of the Code. That provision, first included in the Income Tax Act of 1913, exempts from income and other taxes imposed by Chapter 1 of the Code any "labor," "agricultural," or "horticultural" organization. The legislative history, Treasury Regulations, and decisions relating to this provision clearly indicate that the exemption granted by this section is limited to those organizations which have no income inuring to the benefit of any member, are educational or instructive, and have as their objects the betterment of the conditions of those engaged in the named pursuits, the improvement of their products and the development of greater efficiency in their occupations.

The record shows that this taxpayer is a corporation organized and operated on a cooperative basis strictly as a marketing agency for the benefit of farmer members. It is not an "agricultural" or "horticultural" organization such as would be exempt from income tax under Section 101(1) of the Internal Revenue Code. Hence it is not exempt from liability for the employment tax with respect to the services rendered by its employees on that ground.

On the record, this taxpayer, if it is exempt from the income tax at all, would be exempt under Section 101(12) of the Code as a farmers', fruit growers', or like cooperative association.

While it might be questioned whether the taxpayer has proved all facts to establish income tax exemption under Section 101(12), that may be assumed because such exemption does not necessarily carry with it exemption from all employment tax. Hence, to establish exemption from the tax here involved the burden was upon the taxpayer to prove that the employment on which the disputed tax here involved constituted "agricultural labor" within the meaning of the statute.

Services rendered by an employee for any organization exempt from income tax by Section 101 of the Code (except Section 101(1)) are not subject to the employment tax if the remuneration for such services in any one quarter did not exceed $45, or if such services were rendered by a student enrolled and regularly attending classes at a school, college, or university, etc. Section 101(12) of the Code grants a limited exemption from income tax to farmers' and fruit growers' cooperative associations. The Commissioner of Internal Revenue previously had granted the taxpayer exemption under the corresponding provision of the Revenue Act of 1928, but prior to institution of the present action he revoked that exemption as of January 1, 1939 (effective date of the Internal Revenue Code) because of the taxpayer's failure to submit the information requested in support of its exempt status. While the taxpayer has proved that it is a cooperative marketing association operated exclusively for the benefit of its farmer members, it is not clear that it met all of the conditions for exemption under Section 101(12) during the periods involved. But even if its exempt status under this section be assumed, it still has failed to show that the services upon which the disputed tax was based were exempt under Section 1426(b)(10)(A) of the Code.

Finally, the services performed for the taxpayer by its employees with respect to which the disputed em-

ployment tax here involved was paid were not exempt from the tax as "agricultural labor" as defined in Section 1426(h) of the Code.

The Commissioner of Internal Revenue has ruled that the services performed by most of the taxpayer's employees during the tax periods involved constituted "agricultural labor" within the meaning of the statute. But under the facts and the law he properly ruled that the administrative and clerical services performed by the taxpayer's manager, bookkeeper, secretary and office clerk did not constitute "agricultural labor" within the meaning of the statute and, therefore, are subject to the employment tax. Accordingly, the decision of the court below should be reversed.

ARGUMENT

The Taxpayer Is Not Entitled to Exemption from the Employment Tax Here Involved

Exemption from the employment tax is accomplished in certain cases by excluding from the above definition a number of specific classes of services rendered by an employee for his employer. The provisions necessary to consider in determining the issues here involved are Section 1426(b)(1) of the Code, which excludes "agricultural labor" as defined in Section 1426(h); Section 1426(b)(10)(A), which excludes services performed in any calendar quarter in the employ of an organization exempt from income tax under Section 101 of the Code if "(i) the remuneration for such service does not exceed $45, or * * * (iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university"; and Section 1426(b)(10)(B), which excludes service performed in the employ of an "agricultural" or "horticultural"

organization exempt from income tax under Section 101(1) of the Code (all sections in Appendix, *infra*).

Section 1410 of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939 (Appendix, *infra*), provides that in addition to other taxes, every employer shall pay an excise tax, commonly referred to as social security tax, with respect to having individuals in his employ,[4] equal to certain stated percentages of the "wages", as defined, paid with respect to "employment", as defined, after the effective date of the tax. To effect the tax coverage intended by the Code the terms "wages" and "employment", among others, are defined at length. With respect to the years here involved, Section 1426(a) of the Code, as amended (Appendix, *infra*), defines the term "wages" to mean "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash", with certain enumerated exceptions not material here.[5] The term "employment" is defined, so far as material here, in Section 1426(b) of the Code, as amended, to mean any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, within the United States, with many enumerated exceptions, two of which are important here.

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[4] A similar "social security tax" is imposed by Section 1400 of the Internal Revenue Code, as amended, upon income received by individuals equal to stated percentages of "wages" received with respect to "employment" as defined by the Code.

[5] For definition of the terms "wages" and "employment" as applicable prior to January 1, 1940, see Section 811 of the Social Security Act, c. 531, 49 Stat. 620, 639, as amended, and Section 1426 of the Internal Revenue Code, effective April 1, 1939.

A. *The taxpayer is not an "agricultural" or "horticultural" organization within the meaning of Section 101 (1) of the Internal Revenue Code and as such exempt under Section 1426 (b) (10) (B) of the Code, as amended, from payment of the employment tax imposed under Section 1410, as amended*

Section 1426 (b) (10) (B) of the Code, as amended, upon which the court below seems to have principally relied in rendering its decision,[6] provides that "employment", as defined in subsection (b), shall not include "Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1)" of the Code (Appendix, *infra*). Thus, if the taxpayer is an "agricultural" or "horticultural" organization within the meaning of the latter section it is exempt from payment of the employment tax with respect to remuneration paid to any of its employees for services rendered, regardless of the nature of those services. We submit there is no basis in the record for holding the taxpayer exempt under these provisions.

Section 101 exempts from the taxes imposed by Chapter 1 of the Code many enumerated organizations. Paragraph (1) of that section exempts "labor", "agricultural", and "horticultural" organizations. This exemption has been included in our income tax statutes

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[6] While the court below concluded as a matter of law (R. 38) that the taxpayer's "employees" were exempt from social security tax, the question at issue was the taxpayer's liability for the taxes involved. However, it appears from the discussion at the hearing (R. 89-90), and the court's oral opinion (R. 27-33, 97-104), that the court ruled the taxpayer to be an exempt corporation within the meaning of Section 101(1) and (12) of the Code for the periods involved. The court made no reference to the limited exemption from tax under Section 1426(b) (10) (A), and made no direct ruling with respect to the question whether the services performed by the taxpayer's employees upon which the controverted tax was based constituted "agricultural labor" within the meaning of the Code.

since the beginning.[7] The applicable Treasury Regulations consistently have defined the organizations covered by this subsection as those which have no income inuring to the benefit of any member, are educational or instructive, and have as their objects the betterment of the conditions of those engaged in the named pursuits, the improvement of their products and the development of greater efficiency in their occupations.[8] That the regulations are in accord with Congressional intent is made clear by the debate on the floor of the Senate in connection with the Revenue Act of 1921[9] when the language of this particular provision was last considered by Congress. 61 Cong. Record, Part 6, pp. 5957-5959. See, also, Seidman's Legislative History of Federal Income Tax Laws, pp. 855-859.

In addition to the specific exemption of "labor", "agricultural", and "horticultural" organizations from federal income taxation Congress has uniformly included a provision exempting, with certain limitations, from income taxation farmers', fruit growers', and like associations organized on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or which were organized

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[7] See Income Tax Act of 1913, c. 16, 38 Stat. 114, 172, Sec. II G(a); Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 11(a); and corresponding provisions of succeeding Revenue Acts.

[8] See Treasury Regulations 111, Sec. 29.101(1)-1 (Appendix, *infra*), and the corresponding provisions of Regulations issued under the earlier Revenue Acts. See, also, *Farmers Union State Exchange* v. *Commissioner*, 30 B.T.A. 1051; *Portland Co-operative Labor Temple Ass'n* v. *Commissioner*, 39 B.T.A. 450; S.M. 2558, III-2 Cum. Bull. 207 (1924); I.T. 2325, V-2 Cum. Bull. 63 (1926). Compare O.D. 523, 2 Cum. Bull. 211 (1920); A.R.M. 79, 3 Cum. Bull. 235 (1920).

[9] C. 136, 42 Stat. 227.

and operated for the purpose of purchasing supplies or equipment for the use of members or other persons and turning over such supplies and equipment to them at cost, plus necessary expenses.[10]

It long has been settled that deductions from income or exemptions from tax are granted only as a matter of legislative grace, and that the burden is upon the person claiming such deduction or exemption to bring himself within the statutory provisions authorizing it.[11] *Commissioner* v. *Shoong,* 177 F. 2d 131 (C. A. 9th), and cases cited. Exemption depends upon the facts of the particular case.

It is clear from the record here that this taxpayer was not exempt under Section 101 (1) from income tax. It was organized in 1930 (R. 72) for the purposes set out in the findings below (R. 34). During the periods here involved it was engaged in warehousing, packing and selling rhubarb grown by its farmer members. All of the rhubarb handled by it was grown on farms of members and practically all of the rhubarb sold was shipped from packing on the farm where it was grown. The rest of the rhubarb handled by it was packed by the taxpayer at and shipped from its warehouse. (R. 35.) Its dealings with its members are described by the witness Goettsch, the taxpayer's manager. (R. 65-84.) The members paid a membership fee of $1 and signed a marketing agreement under which he had to sell his rhubarb through the association. (R. 78-79.) The taxpayer markets the product and pays the grower the amount of the sale price less 20 cents a

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[10] Section 101(12) of the Internal Revenue Code (Appendix, *infra*), and corresponding provisions of earlier Revenue Acts.

[11] The nature of evidence to establish tax exemption to the satisfaction of the Commissioner under Section 101 of the Code is indicated by Section 29.101-1 of Treasury Regulations 111 and corresponding provisions of Regulations issued under the earlier Revenue Acts.

box, which is retained to cover expenses of operation. Any amount left unused at the end of the season is distributed to members on the basis of the number of boxes sold to the association. (R. 79-81.) The taxpayer also purchases and sells supplies to its members at cost. (R. 79.)

The provisions of Section 101 (1) and (12) are mutually exclusive. Regardless of the opinion expressed by the court below (R. 32, 89-90), we know of no authority to the contrary. The very language of paragraph (12) and other specific exemption provisions of Section 101 make it abundantly clear that Congress never intended to include corporations of the character here involved within the provisions of Section 101 (1). We submit the court erred under the facts and the law in holding taxpayer to be an exempt corporation within the meaning of Section 101 (1) of the Internal Revenue Code.

B. *The record does not establish that the taxpayer was exempt from income tax under Section 101 (12) of the Code, or that the services in question were exempt under Section 1426 (b) (10) (A)*

As stated above, the taxpayer was organized in 1930 (R. 72) for the purposes set out in the findings below (R. 34). Clearly it was organized and operated during the periods here involved exclusively as a cooperative marketing association for the benefit of its farmer members. In 1931 the Commissioner ruled that the taxpayer was exempt from income tax under Section 103 (12) of the Revenue Act of 1928. (R. 36, 45.)[12] He revoked the taxpayer's exemption under that section as of January 1, 1939 (effective date of the Internal

[12] C. 852, 45 Stat. 791.

Revenue Code), for failure to submit evidence of its exempt status under the Code.

The exemption from income tax accorded by Section 101 (12) in the case of farmers' and fruit growers' co-operative associations is limited. Exemption depends both upon the purposes for which it was organized and the method of its operation. Whether an association is exempt for any particular taxable period is a question of fact. For instance, exemption will not be denied because the association has capital stock, provided the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the state of incorporation or eight percent per annum, whichever is greater, on the value of the consideration for which the stock was issued. Nor will exemption be denied such association because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose. But these and other conditions of the statute are questions of fact, and the burden of proof being what it is in cases where taxpayers are claiming exemption from tax it cannot be said that the record here adequately establishes the taxpayer's exempt status under Section 101 (12) for the tax periods involved.

However, assuming that the taxpayer was exempt from income tax under Section 101 (12) for the periods involved, there is no evidence in the record to show that the remuneration paid the taxpayer's employees with respect to which the tax here in controversy was collected is exempt from employment tax under Section 1426 (b) (10) (A), which, so far as material here, applies only if the remuneration for service performed in any one quarter does not exceed $45, or if such service is performed by a student enrolled and regularly attending classes at a school, college or university. The

contrary appears to be true.[13] Accordingly, it cannot be held that the taxpayer is exempt from the employment taxes here involved by reason of any claimed exemption from income tax under Section 101 (12) of the Code.

C. *The services here involved did not constitute "agricultural labor" within the meaning of the statute and therefore were not exempt from the employment tax involved*

The only other provision of the statute under which the taxpayer can claim exemption from the employment tax here involved is Section 1426 (b) (1) of the Code, which exempts "agricultural labor" as that term is defined in Section 1426 (h).

Paragraph (1) of Section 1426(h) defines "agricultural labor" for the purposes of the statute to include all services performed on a farm "in connection with" cultivating the soil, or "in connection with" raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife. Paragraph (2) defines the term to include all services performed in the employ of the owner or tenant or other operator of a farm, "in connection with" the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such services are performed on a farm. Paragraph (3) includes in the term

[13] That a corporation exempt from income tax under Section 101(12) is still subject to social security tax was called to the attention of the court and counsel for the taxpayer at the hearing (R. 57), thus permitting proof of exemption under Section 1426(b)(10)(A) if such were the case.

all services performed "in connection with" the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in Section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

When the nature of the services here involved is considered it will be clear that such services could not be classed as "agricultural labor" within the above definitions. Accordingly, the only definition of "agricultural labor" upon which the taxpayer can rely is paragraph (4) of Section 1426(h) which includes in the definition all services performed—

> In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed *as an incident to ordinary farming operations* or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable to services performed in connection with commercial canning or commercial freezing *or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.* (Italics supplied.)

In adjusting the taxpayer's refund claims the Commissioner held that the services of all but four of the taxpayer's employees constituted "agricultural labor" within the meaning of Section 1426(h) of the Code.

He found that about fifty per cent of the time of the taxpayer's manager was devoted to agricultural labor and the other half to the administrative functions of the association; that twenty-five per cent, or less, of the time of its bookkeeper was devoted to what he considered agricultural labor; and that its secretary and its office clerk devoted no time to such labor. He therefore held that the wages paid to these four employees was subject to the employment tax. (R. 44-48.)[14]

We submit the administrative and clerical services rendered by these four employees do not constitute "agricultural labor" within the meaning of the statute and the applicable Treasury Regulations issued thereunder.[15]

As this Court pointed out in *North Whittier Heights C. Ass'n* v. *National L. R. Board,* 109 F. 2d 77, 79, certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724, involving the definition of "agricultural laborers" under the National Labor Relations Act, pursuit of definitions of the term through the cases leads to confusion because generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent.

The Social Security Act Amendments of 1939, which (by Section 606) amended Section 1426 of the Internal Revenue Code to include the definition of "agricultural labor" here under consideration, further (by Section 614) amended Section 1607(1) of the Code to include

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[14] The Commissioner's allocation of the services of the manager and the bookkeeper has not been questioned and seems to be supported by the evidence. (R. 65-89.) Accordingly, if such administrative and clerical services are held not to constitute "agricultural labor" within the meaning of the Act, all of the wages paid these four employees are subject to the tax. See Section 1426(c) of the Code and Section 402.407 of Treasury Regulations 106. (Appendix, *infra.*)

[15] See Treasury Regulations 106, Section 402.208 (Appendix, *infra*).

the identical definition of "agricultural labor" for purposes of the excise tax imposed on employers of eight or more persons, and also (by Section 201) amended the Social Security Act of 1935, c. 531, 49 Stat. 620, to include as Section 209(1) thereof, as amended, the identical definition of "agricultural labor" for purposes of the old age and survivors' insurance benefits provided under that Act. There have been decisions [16] and Internal Revenue Bureau rulings [17] holding that labor performed in certain situations constituted "agricultural labor" within the meaning of the statute and the regulations. There also are decisions dealing with the definition of "agricultural labor" for the purposes of these statutes prior to the 1939 amendments which, while not definitely in point, may be helpful. See *United States* v. *Turner Turpentine Co.,* 111 F. 2d 400 (C. A. 5th); *Jones* v. *Gaylord Guernsey Farms,* 128 F. 2d 1008 (C. A. 10th); *Latimer* v. *United States,* 52 F. Supp. 228 (S. D. Cal.), and others. But none of the decisions has gone so far as to hold that administrative and clerical services, such as the services here involved, performed for a cooperative or other organization not engaged in any agricultural pursuit, constituted labor performed "as an incident to ordinary farming operations" within the meaning of Section 1426(h) of the statute and Section 402.208 of Regulations 106. As pointed out in the foregoing section of the Regulations, since the excepted services as defined in the statute must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to car-

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[16] e.g. *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C.A. 5th); *Birmingham* v. *Rucker's Breeding Farm,* 152 F. 2d 837 (C.A. 8th); *United States* v. *Navar,* 158 F. 2d 91 (C.A. 5th); *Lee Wilson & Co.* v. *United States,* 171 F. 2d 503 (C.A. 8th).

[17] Mim. 6046, 1946-2 Cum. Bull. 147; Mim. 6056 1946-2 Cum. Bull. 148; Mim. 6086, 1946-2 Cum. Bull. 150.

rier for transportation to market, of the commodity, such excepted services do not include services performed "as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities," unless the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm. That this construction was the intent of Congress is made clear by the report of the Senate Committee on Finance in connection with the Social Security Act Amendments of 1939. S. Rep. No. 734, 76th Cong., 1st Sess., p. 64 (1939-2 Cum. Bull. 565-581).

In *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C. A. 5th), it was held (for years before the 1939 amendments) that labor performed by employees of a cooperative packing association not performed in the field or in connection with getting fruit from field to the place of processing was not agricultural labor. And in *United States* v. *Turner Turpentine Co., supra,* p. 404, the same court held that the 1939 amendments defining "agricultural labor" in detail are to be deemed interpretative and explanatory of the term as used in the earlier acts. In *Jones* v. *Gaylord Guernsey Farms, supra,* the court held that the services of a bookkeeper and a stenographer performed in connection with a farm (before the 1939 amendments) did not constitute agricultural labor. In *Larson* v. *Ives Dairy Co.,* 154 F. 2d 701 (C. A. 5th), the court held that services performed for a dairy (before the 1939 amendments) by its office help and sales solicitor were not agricultural labor. In *Latimer* v. *United States,* 52 F. Supp. 228 (S. D. Cal.), the court held that services similar to those here involved (also before the 1939 amendments), or even more closely related to the farm-

ing operations of the cooperative's members, did not constitute agricultural labor.

Of equal importance here are the recent decisions of this Court in *Miller* v. *Burger,* 161 F. 2d 992, and *Miller* v. *Bettencourt,* 161 F. 2d 995, which involve construction of this definition in connection with old age and survivors' insurance coverage of the Social Security Act. While the employer in those cases was not a cooperative association as here, this Court's opinions make clear the limitation upon what constitutes "agricultural labor" for purposes of the Act and were made the basis of the decision of the District Court for the Northern District of California in *Baiocchi* v. *Ewing,* 87 F. Supp. 520, wherein it was held that, for purposes of Social Security Act coverage, services more intimately related to farming operations than to those here involved, performed for an agricultural cooperative association, did not constitute "agricultural labor" within the meaning of the statute.

This taxpayer is a cooperative marketing association organized and operated for the benefit of its farmer members. It is not engaged in any farming operations on its own account. The administrative and clerical services of its manager, bookkeeper, secretary and office clerk were not services, "performed as an incident to ordinary farming operations" within the meaning of Section 1426(h) of the Internal Revenue Code, as amended, and should not be exempt from employment tax under the Federal Insurance Contributions Act.

CONCLUSION

The decision of the court below is wrong. It is contrary to the facts and the law and should be reversed and remanded to the court below with directions to dismiss the complaint.

Respectfully submitted,

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APRIL, 1950.

APPENDIX

Internal Revenue Code:

SEC. 101 EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

(1) Labor, agricultural, or horticultural organizations;

* * *

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for

members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under this paragraph;

* * *

(26 U.S.C. 1946 ed., Sec. 101.)

Sec. 1410 [as amended by Sec. 604 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. Rate of Tax.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426(a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

* * *

(26 U.S.C. 1946 ed., Sec. 1410.)

Sec. 1426 [as amended by Sec. 606 of the Social Security Act Amendments of 1939, *supra*]. Definitions.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

* * *

(b) *Employment.*—the term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever

nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

(1) Agricultural labor (as defined in subsection (h) of this section);

* * *

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1);

* * *

(c) *Included and Excluded Service.*—If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not

constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection the term "pay period" means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by paragraph (9) of subsection (b).

* * *

(h) *Agricultural Labor.*—The term "agricultural labor" includes all services performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used

exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(26 U.S.C. 1946 ed., Sec. 1426.)

Sec. 1432 [as added by Sec. 607 of the Social Security Act amendments of 1939, *supra*]. This subchapter may be cited as the "Federal Insurance Contributions Act."

(26 U.S.C. 1946 ed., Sec. 1432.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.101(1)—1. *Labor, Agricultural, and Horticultural Organizations.*—The organizations contemplated by section 101(1) as entitled to exemption from income taxation are those which—

(1) Have no net income inuring to the benefit of any member;

(2) Are educational or instructive in character; and

(3) have as their object the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

Organizations such as county fairs and like associations of a quasi public character, which are designed to encourage the development of better agricultural and horticultural products through a system of awards, and whose income from gate receipts, entry fees, and donations is used exclusively to meet the necessary expenses of upkeep and operation, are thus exempt. On the other hand, associations which have for their purpose, for example, the holding of periodical race meets, the profits from which may inure to the benefit of their shareholders, are not exempt. Similarly, corporations engaged in growing agricultural or horticultural products for profit are not exempt from tax.

Treasury Regulations 106, promulgated under the Internal Revenue Code:

SEC. 402.203 [amended by T. D. 5519, 1946-2 Cum. Bull. 139] *Employment after December 31, 1939.*—(a) *In general.*—Whether services performed on or after January 1, 1940, constitute employment is determined under section 1426(b) of the Act, that is, section 1426(b), as amended, effective January 1, 1940, by section 606 of the Social Security Act Amendments of 1939. This section of these regulations, and sections 402.204 and 402.205 (relating to who are employees and employers), section 402.206 (relating to excepted services in general), section 402.207 (relating to included and excluded services), and sections 402.208 to 402.226, inclusive (relating to the several classes of excepted services), apply with respect only to services performed on or after January 1, 1940.

*　　*　　*

(b) *Services performed within the United States.*—Services performed on or after January 1, 1940, within the United States, that is, within any of the several States, the District of Columbia, or the Territory of Alaska or Hawaii, by an employee for the person employing him, unless specifically excepted by section 1426(b) of the Act, constitute employment within the meaning of the Act. Services performed outside the United States, that is, outside the several States, the District of Columbia, and the Territories of Alaska and Hawaii (except certain services performed on or in connection with an American vessel—see paragraph (c)), do not constitute employment.

*   *   *

Sec. 402.206. [amended by T.D. 5519, *supra*] *Excepted services in general.*—Services performed on or after January 1, 1940, by an employee for the person employing him do not constitute employment for purposes of the tax if they are specifically excepted by any of the numbered paragraphs of section 1426(b) of the Act, that is, section 1426(b), as amended, effective January 1, 1940, by section 606 of the Social Security Act Amendments of 1939. Such services do not constitute employment for purposes of the tax even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel.

The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services rendered by the employee in an excepted class.

*   *   *

Sec. 402.207. *Included and excluded services.*—If a portion of the services performed by an employee for the person employing him during a pay period constitutes employment, and the remainder does not constitute employment, all the services of the employee during the period shall

for purposes of the tax be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 1426(b) of the Act constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

If *one-half or more* of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then *all* the services of that employee for that person in that pay period shall be deemed to be employment.

If *less than one-half* of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then *none* of the services of that employee for that person in that pay period shall be deemed to be employment.

* * *

SEC. 402.208. *Agricultural labor.*—(a) *In general.*—Services performed by an employee for the person employing him which constitute "agricultural labor" as defined in section 1426(h) of the Act are excepted. The term as so defined includes services of the character described in paragraphs (b), (c), (d), and (e) of this section.

In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(b) *Services described in section 1426(h)(1) of the Act.*—Services performed on a farm by an employee of any person in connection with any of the following activities are excepted as agricultural labor:

(1) The cultivation of the soil;

(2) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(3) The raising or harvesting of any other agricultural or horticultural commodity.

The term "farm" as used in this and succeeding paragraphs of this section includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets), do not constitute "farms."

(c) *Services described in section 1426 (h) (2) of the Act.*—The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms are excepted as agricultural labor, provided the major part of such services is performed on a farm:

(1) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(2) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

The services described in (1) above may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the exception does not extend to services performed by employees

of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

(d) *Services described in section 1426(h)(3) of the Act.*—Services performed by an employee in the employ of any person in connection with any of the following operations are excepted as agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The hatching of poultry;

(3) The raising or harvesting of mushrooms;

(4) The operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying or storing water for farming purposes;

(5) The production or harvesting of maple sap or the processing of maple sap into maple sirup or maple sugar (but not the subsequent blending or other processing of such sirup or sugar with other products); or

(6) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 1426(h)(4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see subparagraph (2), below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the

excepted services described in such subparagraphs must be rendered in the actual handling, planting, drying, packing packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

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